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IN THE

Supreme Court of the United States

October Term, 1974

NO.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, et al.

Petitioner,

vs.

THE BOEING COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

I. OPINIONS BELOW

The opinion of the District Court for the Middle District of Florida is reported at 351 F.Supp. 813. The opinion of the Fifth Circuit Court of Appeals is reported at 504 F.2d 307. Both are set forth in their entirety in the Appendix to the Petition for a Writ of Certiorari at pages 1a through 41a.

II. JURISDICTION

The jurisdiction is set forth in the Petition for a Writ of Certiorari.

III. QUESTION PRESENTED

Is the Boeing Company, which submitted the successful bid to the government on a competitively bid contract, and which, without discrimination,[1] populated a majority of its work force with nonpredecessor employees, a successor employer and therefore obligated as a successor to arbitrate claims submitted to it by the International Association of Machinists, the collective bargaining representative of the predecessor's employees?

IV. STATEMENT OF THE CASE

A. GENERAL

From March 9, 1964, until April 1, 1971, Trans World Airlines (TWA) performed certain support services for the National Aeronautics and Space Administration (NASA) at the Kennedy Space Center, Florida. In July, 1970, NASA issued a request for competitive bids for the work then being performed by TWA. The Boeing Company (Boeing), among others, submitted bids to NASA. In November, 1970, Boeing was selected as the company to enter negotiations with NASA for the eventual award of the support services contract.

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[1] The International Association of Machinists has stated, for the purpose of this proceeding, it is not contending that the company engaged in discriminatory hiring practices (AIV 1938). That issued was raised and fully litigated by the union in a separate unfair labor practice proceeding before the National Labor Relations Board. The Boeing Company was found not to have engaged in discriminatory hiring practices by the Board. See The Boeing Company and the International Association of Machinists, 214 NLRB No. 32, 87 LRRM 1461 (1974).

The TWA production and maintenance employees - approximately 1000 - were part of a nationwide collective bargaining unit represented by the International Association of Machinists (IAM). Boeing, a hardware contractor at the Kennedy Space Center, was also a party to a collective bargaining agreement with the IAM. The Boeing-IAM agreement was applicable to, "All production and maintenance employees in Brevard County in the State of Florida, employed by the Company . . ." (AI 44, p. 12).[2] Therefore, Boeing utilized the wages and fringe benefits of the Boeing-IAM agreement in submitting its bid to NASA, and upon contract award, applied to Boeing-IAM agreement to the support services production and maintenance employees (AII 952-968, AIII 969-995).

B. MAJORITY OF WORK FORCE OBTAINED FROM NONPREDECESSOR SOURCE

Following selection of Boeing by NASA as the company with whom it would negotiate, a series of meetings were held between TWA and Boeing officials to discuss the contract award to Boeing (AIII 1073, 1074, 1428).[3]

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[2] The letter "A" refers to the Appendix in the Fifth Circuit Court of Appeals: Roman Numeral "I" refers to the Volume of the Appendix; and the Arabic Numeral "44" refers to the page number in the Appendix. In this particular reference, "p. 12" refers to the page of the collective bargaining agreement on which the quote is found.

[3] At this same time, meetings were held by Boeing with IAM officials, including Floyd Smith, The International President, and Charles West and William Winpisinger, International Vice Presidents. During these meetings, the IAM was advised of the substance of the Boeing bid to NASA. Ways of reconciling problems were also discussed (AIV 1500-1503). Following a meeting on December 4, 1970, Mr. West of the IAM advised Boeing that the IAM could not go along with the Boeing-IAM wage scale for the support employees in Florida (AIII 1219).

To facilitate the employment process, Boeing agreed to deliver employment applications to TWA for distribution to TWA employees (AIII 1428). TWA requested that Boeing not contact TWA employees; Boeing agreed but informed TWA that if TWA employees presented themselves at the Boeing employment office seeking a job, their application would be accepted (AIII 1074, 1106). Over 1000 Boeing employment applications were delivered to TWA during December, 1970 (AIII 1106).

In January, 1971, Boeing began its actual employment process. Since there had been a shortage of applications from TWA production and maintenance employees, Boeing contacted TWA to determine the reason. The TWA Vice President acknowledged the contact but took no affirmative action because he did not feel it was his duty to influence TWA employees to apply with Boeing (AIII 1435). Furthermore, there was a feeling among the IAM represented TWA employees that, if they did not apply for employment with Boeing, NASA would be forced to return the support service contract to TWA. Specifically, the President of IAM Local Lodge 773, which represented the TWA employees, told his membership that, if they did not file employment applications with Boeing, then Boeing would not be able to maintain the support operation and Boeing's bid to NASA would be "defeated" (AIII 1370-1371). On December 22, 1970, a letter was sent to all IAM represented TWA employees from the Local Lodge IAM President which stated:

> "We have been advised by the International Headquarters that we should not turn these (Boeing) applications in." (AIII 1194).

The net result of the IAM's actions was to deprive TWA employees of job opportunities with Boeing. When Boeing determined that it was not receiving sufficient applications from predecessor personnel, Boeing advertised for employees in local newspapers (AII 838). By March 31, 1971, Boeing had received applications from 386 incumbent TWA employees, 149 Boeing or former Boeing employees, and 472 outsiders (AIV 1734-1736, 1766). Therefore, as of the April 1, 1971, takeover date, only approximately 38-39% of the Boeing work force were formerly associated with TWA and covered by the TWA-IAM collective bargaining agreement while 61-62% were strangers to both TWA and the TWA-IAM agreement. At no time did the TWA-IAM Local Lodge represent a majority of the Boeing employee complement.

It must also be remembered that TWA and Boeing were competitors for the Installation Support Service contract. This was not a merger nor acquisition by Boeing from TWA. There were *no dealings* between Boeing and TWA except to the extent that Boeing and TWA conferred respecting the possible employment of TWA personnel. Throughout the period that Boeing was recruiting a work force, both TWA and IAM were actively opposing the contract award to Boeing, both through administrative protests and lawsuits in federal court (AI 47-69, 79, 81-86, 108, 109, 121-129, 137-142). *Trans World Airlines, Inc. v. George Low, Acting Administrator, National Aeronautics and Space Administration, et al.*, Civil Action No. 452-71, United States District Court, District of Columbia; *International Association of Machinists v. James Hodgson, et al.*, Civil Action No. 1233-71, United States District Court, District of Columbia. The TWA employees were kept advised of

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all protests and of the TWA lawsuit both by TWA and the IAM (AIII 1348, 1411-1413; AIV 1890, 1892, 1893, 1895, 1897).

C. THE ENSUING LITIGATION

Both prior and subsequent to Boeing's assumption of operational responsibility on April 1, 1971, the IAM pressed its demand that Boeing abide by the TWA-IAM collective bargaining agreement and/or submit certain issues to arbitration under the TWA-IAM agreement (AI 8, 9, 30, 31). As a result of the IAM's continued insistence that the TWA-IAM contract apply, Boeing, on May 10, 1971, filed suit for declaratory judgment that Boeing was not bound by the TWA-IAM collective bargaining agreement (AI 1-12). The IAM, on May 27, 1971, filed a counterclaim seeking, *inter alia*, a declaratory judgment that Boeing was bound by the terms of the TWA-IAM agreement and was obligated to arbitrate any claims submitted by the IAM that Boeing had violated the TWA-IAM collective bargaining agreement (AI 13-43). The district court, upon cross motions for summary judgment, declared ". . . Boeing is not a successor and is not bound by the collective bargaining agreement between TWA and IAMAW" (AIV 1942), and further declared that the IAM's ". . . prayer for an Order (requiring arbitration) be and is hereby denied" (AIV 1942). An appeal from this Order was taken to the Fifth Circuit Court of Appeals by the IAM. On November 15, 1974, the Fifth Circuit affirmed, saying:

> "We hold, then, that given the nature of the relationship between TWA and Boeing, the extent of the continuity in the identity of the work force established here is not sufficiently substantial to oblige Boeing under §301 to arbitrate under its predecessor's contract. Howard Johnson, ____ U.S.

at ___ 94 S.Ct. at 2244, 41 L.Ed.2d at 58." (Appendix, 31a)[4]

The instant Petition for Writ of Certiorari was then filed by the IAM.

V. ARGUMENT

A. INTRODUCTION

Supreme Court Rule 19 clearly establishes guidelines governing review on certiorari. Simply stated, in the context of the instant case, Petitioner should demonstrate that (a) the decision of the Fifth Circuit is in conflict with the decision of another court of appeals; or (b) the Fifth Circuit decided an important question of federal law that was previously undecided, and which should be settled by the Supreme Court; or (c) the Fifth Circuit decided a federal question in a way that conflicted with a Supreme Court decision; or (d) the Fifth Circuit departed, or sanctioned departure from, the accepted and usual course of judicial proceedings. It is the position of The Boeing Company that the Petition does not fall within the standards set forth above, nor does it demonstrate any other reason that the exercise of sound judicial discretion would compel the granting of the writ.

B. THERE IS NOT AN IMPORTANT QUESTION OF FEDERAL LAW

The IAM, in its Petition, never clearly identifies its theory of why the Court should grant certiorari. Petitioner appears to argue that there is an important

[4] "Appendix 31a" refers to the appropriate page number of the Appendix included as part of the Petition for a Writ of Certiorari.

federal question that has not been resolved by this Court. Boeing takes issue with this assertion.

To develop the concept of "important federal question," the Petitioner notes that service contracts calling for the furnishing of services to federal agencies are negotiated "at the rate of about 21,000 annually," under which "several hundred thousand employees" are employed (Petition, p. 20). However, the recent Supreme Court cases of *Howard Johnson Co., Inc. v. Detroit Local Joint Executive Board*, 417 U.S. 249 (1974) and *NLRB v. Burns International Security Services*, 406 U.S. 272 (1972), have provided the "process of litigating elucidation"[5] considered essential by the Petitioner, if in fact there was an important federal question. Furthermore, most if not all of these "21,000 annual" bids are now governed by the 1972 Amendments to the Service Contract Act.[6] Thus, the "important federal

[5] IAM v. Gonzales, 356 U.S. 617, 619 (1958).

[6] 41 U.S.C. §353(c). Any argument that the amended Service Contract Act should be made retroactive and applied to The Boeing Company's 1970 bid to NASA is clearly without merit. It was not litigated in the lower courts. In fact, the counterclaim of the IAM upon which the Petitioner seeks relief was filed over one year before the Service Contract Act was amended. No amended counterclaim was ever filed. Motions for summary judgment were filed and oral arguments heard in early 1972 — served months *before* the October 9, 1972, amendments to the Service Contract Act. Had 41 U.S.C. §353(c) been law at the time Boeing submitted its bid to NASA in 1970, the Boeing bid would, of necessity, have taken the law into consideration. Petitioner suggests, in effect, that the Service Contract Act amendments be given controlling weight as an interpretation of pre-existing federal labor policy and therefore should be given retroactive effect. The Fifth Circuit correctly concluded that the 1972 Service Contract Act amendments do not apply retroactively (Appendix 8a). Any other conclusion would reach the unconscionable result of imposing an obligation on Boeing which clearly did not exist at the time Boeing submitted its bid to NASA.

question," if indeed there ever existed an important federal question, has now been answered for future application by Congress. Should the Court grant the Petition, any decision it might reach, as it related to competitive bidding on government contracts would, in all probability, have an impact only on the parties to the instant litigation. In view of the Service Contract Amendments, it would not serve as a benchmark for future decisions.

It would appear that the Petitioner, in seeking to invoke the Court's jurisdiction on "an unresolved issue involving important federal questions" has disregarded the words of Chief Justice Taft in *Magnum v. Coty,* 262 U.S. 159, 163 (1923):

> "The jurisdiction (of the Supreme Court to review cases by way of certiorari) *was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing.*" (Emphasis supplied)

C. THERE IS NO CONFLICT OF DECISIONS

The Circuit Court correctly recognized that the recent Supreme Court cases of *Burns* and *Howard Johnson* supplied the controlling precedent (Appendix 9a).

Petitioner attempts to create a conflict where one does not exist. Petitioner states the issue:

> "The first facet of the question presented, therefore, is whether successorship is to be tested by more rigorous criteria when the takeover of an operation is effectuated by bid rather than by merger or purchase."

By whatever criteria utilized, Boeing is not a "successor" to the extent that being a successor would create any possible obligation of Boeing to the employees of TWA or their representative.

The second part of the IAM argument appears to rely on a literal, but out of context, reading of the dissent in *Burns*.[7] Petitioner suggests that the dissent in *Burns* failed to find successorship because the new employer failed to make use of the tangible or intangible assets of the first employer (Petition, p. 21). This argument, even if not taken out of context, ignores the subsequent Court conclusion in *Howard Johnson* where the Court found no successorship despite the fact that Howard Johnson, the franchisor, purchased *all* of its predecessor's personal property and leased its real property and continued in the same business (operation of a motor lodge and restaurant) at the same location as its predecessor. Therefore, even if the theory expressed by the Petitioner was viable, it was put to rest by this Court in *Howard Johnson*.

Petitioner also takes exception to the standard utilized by the Fifth Circuit in determining "continuing substantial identity of the employee complement." The Circuit looked to the percentage of predecessor employees employeed by Boeing - 35% - rather than the percentage of Boeing employees formerly employed by the predecessor - 39% as the critical factor. In the cir-

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[7] The majority (five Justices) in *Burns* refused to require Burns to adopt or abide by the terms of the predecessor's collective bargaining agreement; however, they did require recognition of the predecessor's union as the collective bargaining agent of the successor's employees based on majority status. The four dissenters, to the contrary, not only would not have required contract assumption, they would not even have required recognition.

cumstances of this case, it makes no difference whether the "test" resulting in the 35% figure or the 39% figure is used. Neither constitutes a majority. Petitioner cites a number of cases[8] to demonstrate that the National Labor Relations Board and other courts have adopted the "percentage of successor employees formerly employed by the predecessor" test. However, without exception, as shown by the table below, successorship and the consequent duty to bargain turned on majority status.

CASE NAME	Number of Predecessor's Employees in Successor's Work Force	Number of NonPredecessor Employees in Successor's Work Force	Successorship Found
United Maintenance & Mfg. Company, 214 NLRB No. 31, 87 LRRM 1469 (1974)	7	3	Yes
Dorrance J. Benzchawel, 201 NLRB 905 (1973), enf'd *Zim's Foodliner v. NLRB*, 495 F.2d 1131 (7th Cir. 1974)			
Monroe Store	16	0	Yes
Edgerton Store	9	3	Yes
Middleton Store	1	4	No
NLRB v. Geronimo Service Co., 467 F.2d 903 (10th Cir. 1972)	23	21	Yes
Emerald Maintenance v. NLRB, 464 F.2d 698 (5th Cir. 1972)	76	24	Yes
G. T. & E. Data Services Corp., 194 NLRB 719 (1971)	21	0	Yes
Fry Roofing Company, 192 NLRB 791 (1971)	5	1	Yes
Ranch-way, Inc., 183 NLRB 1168 (1970); enforced, 445 F.2d 625 (10th Cir. 1971); vacated and remanded to NLRB, 81 LRRM 2736 (10th Cir. 1972)	18	5	Yes

[8] See Petition, footnote 10.

Solomon Johnsky, 184 NLRB 826 (1970)		"Majority of Predecessor's	Yes
Western Freight Assn., 172 NLRB 303 (1968)	110	0	Yes
Quaker Tool and Die, 162 NLRB 1307 (1967)	18	0	Yes
Maintenance Inc., 148 NLRB 1299 (1964)	90%	10%	Yes
Royal Brand Cutlery, 122 NLRB 901 (1959)	132	2	Yes
The Boeing Company,[9] 214 NLRB No. 32, 87 LRRM 1461 (1974)	386	601	No

Regardless of the test used; regardless of the numbers used; the percentage remains in the 35% to 39% area. By either figure, there is no successorship and the consequent duty and obligation Petitioner would seek to impose on Boeing.

Further verbage need not be wasted on theories espoused by the Petitioner. As noted, the issue has been settled by the recent Court decision of *Burns, supra,* and *Howard Johnson, supra.* When all the surplusage is brushed aside, the *sine qua non* of a finding of successorship, as it relates to any obligation possibly owed to the predecesor's employees or their representative, must turn on the composition of the successor's employee complement. In truth, there could be no test other than majority status if there is to be maintained any consistency between such decisions and the basic foundations of federal labor policy.

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[9] *The Boeing Company* has been added to those cases listed by the Petitioner in footnote 10 to the Petition. This is the companion case to the instant litigation, arising out of unfair labor practice charges filed by the IAM on April 1, 1971, Case 12-CA-5141 (AI 37, 38, 144, 145).

There were two issues before the Supreme Court in *Burns*. (1) Was Burns a successor to the bargaining relationship between its predecessor, Wackenhut, and the United Plant Guard Workers? (2) Was Burns a successor to the collective bargaining agreement? The Court answered the first in the affirmative; the second was answered in the negative. In finding successorship and the consequent duty to bargain, the Court recognized that Burns had populated a majority of its work force with predecessor employees. The Court found a duty to bargain, "[W]hich arose when it (Burns) selected as its work force the employees of the previous employer . . ."[10] Mr. Justice White, speaking for the *Burns'* majority, also noted:

> "Burns' obligation to bargain (i.e., the finding of successorship) with the union over terms and conditions of employment *stemmed from its hiring of Wackenhut's employees* and from the recent election and Board certification. It has been consistently held that a mere change of employers or of ownership in the employing industry is not such an 'unusual circumstance' as to affect the force of the Board's certification within the normal operative period *if a majority of employees after the change of ownership or management were employed by the preceding employer.*" (Emphasis supplied)[11]

It must also be remembered that Boeing, like Burns, was the successful bidder on a competitively bid contract. Therefore, the analysis by the Court of *John Wiley and Sons v. Livingston,* 376 U.S. 543 (1964), gains added significance.

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[10] 406 U.S. at 278.

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[11] 406 U.S. at 278, 279.

> "Its (Wiley's) narrower holding dealt with a merger occurring against a background of state law that embodied the general rule that *in merger situations* the surviving corporation is liable for the obligations of the disappearing corporation. See, N.Y. Stock Corporation Law, §90 (1951); 15 W. Fletcher, Private Corporations, §7121 (1961 rev. ed.). *Here there was no merger or sale of assets, and there were no dealings whatsoever between Wackenhut and Burns. On the contrary, they were competitors for the same work, each bidding for the service contract at Lockheed.* Burns purchased nothing from Wackenhut and became liable for none of its financial obligations. Burns merely hired enough of Wackenhut's employees to require it to bargain with the union . . ." (Emphasis supplied)[12]

Recognizing that *Burns* was a refusal to bargain case under Section 8(a)(5) of the National Labor Relations Act,[13] it is significant that the Court has also addressed the successorship issue in a Section 301 suit to compel arbitration.[14]

In *Howard Johnson*, Howard Johnson took over a restaurant and motor lodge operation from its franchisee. It acquired all of the personal property and leased the real property. It then staffed its operation with 45 employees, only 9 of whom had been employed by the predecessor. Thus, the old employee to new employee percentage was 20%; in the instant case it is 39%. The Court noted that the ultimate relief sought by the union in *Howard Johnson* was to force Howard

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[12] 406 U.S. at 286.

[13] 29 U.S.C. §158 (a) (5).

[14] 29 U.S.C. §301.

Johnson to hire the predecessor's employees. The IAM seeks the same remedy, as demonstrated by the grievances submitted to Boeing by the IAM (AI 8, 9). In addressing the union's requested relief, the Court, through Mr. Justice Marshall, said:

> "What the Union seeks here is completely at odds with the basic principles this Court elaborated in *Burns*. We found there that nothing in the federal labor laws 'requires that an employer . . . who purchases the assets of a business be obligated to hire all of the employees of the predecessor . . .' Clearly *Burns* establishes that Howard Johnson had *the right not to hire* any of the former Grissom employees, if it so desired. *The Union's effort to circumvent this holding by asserting its claims in a §301 suit to compel arbitration rather than in an unfair labor practice context cannot be permitted.*"[15] (Emphasis supplied)

With regard to the continuity of the identity of the work force, the Court rejected the proposition that 20% was sufficient. The Petitioner, recognizing this rejection, argues that while 20% is insufficient, 39% is sufficient. Where is the "sufficient" point? Is it 26%, 32%, 36%? What does Petitioner suggest? The Court in *Howard Johnson* recognized that majority status is essential to develop the "substantial continuity of identity."[16] Specifically, the Court stated:

> "This view is reflected in the emphasis most of the lower courts have placed on whether the successor employer hires a majority of the predecessor's employees in determining the legal obligations of the successor in §301 suits under *Wiley*. This inter-

[15] 417 U.S. at 261.

[16] 417 U.S. at 263.

pretation of *Wiley* is consistent also with the Court's concern with affording protection to those employees who are in fact retained . . ."[17]

VI. CONCLUSION

The issue has been put to rest. Boeing did not have any obligation to the employees of TWA - employees who refused to submit timely employment application to Boeing. There has been no demonstration of any reason whatsoever why this Court should exercise its discretion and grant certiorari. Therefore, for the reasons set forth above, certiorari should be denied.

Respectfully submitted,

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[17] 417 U.S. at 263, 264. One of the cases cited with approval by the Supreme Court was the federal district court decision in the instant case, Boeing Co. v. International Assn. of Machinists, 351 F.Supp. 813 (M.D. Fla. 1972). See footnote 10 of the *Howard Johnson* opinion.